Problems of the New Nation

VIEWPOINT 18A

A National Bank Would Be Unconstitutional (1791)

Thomas Jefferson (1743–1826)

Thomas Jefferson, appointed by newly elected president George Washington to be the nation's first secretary of state, took office in March 1790. During the next four years Jefferson consistently found himself at odds with the policies of Alexander Hamilton, secretary of the treasury. Hamilton was an advocate of a strong national government; Jefferson was for a limited and frugal one. Hamilton pushed for government policies supporting manufacture and commerce; Jefferson wanted America to remain an agrarian nation. One of their earliest disagreements related to the question of a national bank. In December 1790, Hamilton called on Congress to charter a Bank of the United States. Congress passed such a bill in February 1791; Washington then asked his cabinet officials to submit written opinions on whether Congress had the constitutional authority to take such an action. The following viewpoint is excerpted from Jefferson's written answer to Washington, dated February 15, 1791. Jefferson was dubious of the bank's merits on several grounds, believing it unnecessary for the economy and potentially corrupting for the government. In his paper, Jefferson calls for a strict interpretation of the Constitution, which he concludes does not authorize a national bank.

How does Jefferson argue the Constitution should be interpreted? Why, in his view, does the power to establish a bank not fall within Congress's authority "to regulate commerce"?

I consider the foundation of the Constitution as laid on this ground: that "all powers not delegated to the United States, by the Constitution, nor prohibited by it to the states, are reserved to the states, or to the people." (XIIth amendment.) [actually Amendment X] To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.

From "Opinion on the Constitutionality of the Bank" by Thomas Jefferson, in *The Writings of Thomas Jefferson*, edited by Albert Bergh (Washington, DC: Thomas Jefferson Memorial Association, 1905).

Enumerated Powers

The incorporation of a bank, and the powers assumed by this bill, have not, in my opinion, been delegated to the United States by the Constitution.

I. They are not among the powers specially enumerated: For these are:

1st. A power to lay taxes for the purpose of paying the debts of the United States; but no debt is paid by this bill, nor any tax laid. Were it a bill to raise money, its organization in the Senate would condemn it by the Constitution.

2d. To "borrow money." But this bill neither borrows money nor insures the borrowing of it. The proprietors of the bank will be just as free as any other money holders, to lend or not to lend their money to the public. The operation proposed in the bill, first to lend them two millions, and then borrow them back again, cannot change the nature of the latter act, which will still be a payment, and not a loan, call it by what name you please.

3d. To "regulate commerce with foreign nations, and among the States, and with the Indian tribes." To erect a bank, and to regulate commerce, are very different acts. He who erects a bank creates a subject of commerce in its bills; so does he who makes a bushel of wheat, or digs a dollar out of the mines; yet neither of these persons regulates commerce thereby. To make a thing which may be bought and sold, is not to prescribe regulations for buying and selling. Besides, if this were an exercise of the power of regulating commerce, it would be void, as extending as much to the internal commerce of every State, as to its external. For the power given to Congress by the Constitution does not extend to the internal regulation of the commerce of a State . . . which remain[s] exclusively with its own legislature; but to its external commerce only, that is to say, its commerce with another State, or with foreign nations, or with the Indian tribes. Accordingly, the bill does not propose the measure as a regulation of trade, but as "productive of considerable advantage to trade." Still less are these powers covered by any other of the special enumerations.

Phrases of the Constitution

II. Nor are they within either of the general phrases, which are the two following:—

1. To lay taxes to provide for the general welfare of the United States, that is to say, "to lay taxes for *the purpose* of providing for the general welfare." For the laying of taxes is the *power*, and the general welfare the *purpose* for which the power is to be exercised. They are not to lay taxes *ad libitum, for any purpose they please*; but only to *pay the debts, or provide for the welfare, of the Union.* In like manner,

they are not *to do anything they please*, to provide for the general welfare, but only *to lay taxes* for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless.

It would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would be also a power to do whatever evil they pleased.

"The incorporation of a bank, and the powers assumed by this bill, have not, in my opinion, been delegated to the United States by the Constitution."

It is an established rule of construction, where a phrase will bear either of two meanings, to give it that which will allow some meaning to the other parts of the instrument, and not that which will render all the others useless. Certainly no such universal power was meant to be given them. It was intended to lace them up straitly within the enumerated powers, and those without which, as means, these powers could not be carried into effect. It is known that the very power now proposed *as a means* was rejected *as an end* by the Convention which formed the Constitution. A proposition was made to them, to authorize Congress to open canals, and an amendatory one to empower them to incorporate. But the whole was rejected, and one of the reasons of objection urged in debate was, that they then would have a power to erect a bank, which would render great cities, where there were prejudices and jealousies on that subject, adverse to the reception of the Constitution.

2. The second general phrase is, "to make all laws *necessary* and proper for carrying into execution the enumerated powers." But they can all be carried into execution without a bank. A bank, therefore, is not *necessary*, and consequently not authorized by this phrase.

Conveniences vs. Necessity

It has been much urged that a bank will give great facility or convenience in the collection of taxes. Suppose this were true: yet the Constitution allows only the means which are "necessary," not those which are merely "convenient," for effecting the enumerated powers. If such a latitude of construction be allowed to this phrase as to give any nonenumerated power, it will go to every one, for there is no one which ingenuity may not torture into a *convenience*, in some instance *or other*, to *some one* of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one phrase, as before observed. Therefore it was that the Constitution restrained them to the *necessary* means, that is to say, to those means without which the grant of the power would be nugatory. . . .

Perhaps, indeed bank bills may be a more *convenient* vehicle than treasury orders. But a little *difference* in the degree of *convenience*, cannot constitute the necessity which the Constitution makes the ground for assuming any non-enumerated power. . . .

Can it be thought that the Constitution intended that, for a shade or two of *convenience*, more or less, Congress should be authorized to break down the most ancient and fundamental laws of the several states such as those against Mortmain, the laws of Alienage, the rules of descent, the acts of distribution, the laws of escheat and forfeiture, the laws of monopoly? Nothing but a necessity invincible by other means, can justify such a prostitution of laws, which constitute the pillars of our whole system of jurisprudence. Will Congress be too straitlaced to carry the Constitution into honest effect, unless they may pass over the foundation-laws of the state governments, for the slightest convenience of theirs?

The President's Veto Responsibility

The negative of the President is the shield provided by the Constitution to protect against the invasions of the legislature: 1. The right of the Executive. 2. Of the Judiciary. 3. Of the States and State Legislatures. The present is the case of a right remaining exclusively with the States, and consequently one of those intended by the Constitution to be placed under his protection.

VIEWPOINT 18B

A National Bank Would Not Be Unconstitutional (1791)

Alexander Hamilton (1755–1804)

Alexander Hamilton was appointed by President George Washington to be the nation's first secretary of the treasury. Hamilton energetically used his position to shape American commercial policy, to stabilize public credit, and to promote his vision of a strong national government supported by the wealthy and merchant classes. Among the elements of his vision was a national bank that would serve as a depository for federal funds, provide banknotes for commerce, and make short-term loans for the government.

From *The Works of Alexander Hamilton*, vol. 4, edited by John C. Hamilton (New York: Charles S. Francis, 1850).

Congress passed a law chartering such a bank in February 1791. Washington then asked members of his cabinet—Hamilton, Secretary of State Thomas Jefferson, and Attorney General Edmund Randolph—for opinions on whether to sign or veto the bank bill. Jefferson and Randolph wrote opinions in opposition, arguing that the Constitution did not authorize such activities by the federal government. The following viewpoint is taken from Hamilton's response to Washington's request. He argues against a strict and limited reading of the Constitution and asserts that Congress has implied powers not explicitly stated to govern the nation, including the power of chartering a bank. Washington agreed with Hamilton and signed the bill creating the first Bank of the United States. (Although it was largely successful in achieving Hamilton's goals of stimulating commerce and centralizing the government, its twenty-year charter was ultimately not renewed, and it ended operations in 1811.) Hamilton's views on the Constitution and the implied powers of the federal government became established constitutional law during the long tenure of Supreme Court chief justice John Marshall.

What general principles does Hamilton stress in interpreting the Constitution? What distinction does he make between *implied* and *express* powers? Hamilton had an advantage in that Washington let him read the papers of Jefferson (see viewpoint 18A) and Randolph before composing his own; what direct responses does Hamilton make to Jefferson's arguments?

In entering upon the argument, it ought to be premised that the objections of the Secretary of State and Attorney-General are founded on a general denial of the authority of the United States to erect corporations. The latter, indeed, expressly admits, that if there be anything in the bill which is not warranted by the Constitution, it is the clause of incorporation.

Now it appears to the Secretary of the Treasury that this *general principle* is *inherent* in the very *definition* of government and *essential* to every step of the progress to be made by that of the United States, namely: That every power vested in a government is in its nature *sovereign* and includes, by *force* of the *term*, a right to employ all the *means* requisite and fairly applicable to the attainment of the *ends* of such power, and which are not precluded by restrictions and exceptions specified in the Constitution, or not immoral, or not contrary to the *essential ends* of political society. . . .

If it would be necessary to bring proof to a proposition so clear, as that which affirms that the powers of the federal government, as to *its objects*, were sovereign, there is a clause of its Constitution which would be decisive. It is that which declares that the Constitution, and the laws of the United States made in pursuance of it, and all treaties made, or which shall be made, under their authority, shall be the *supreme law of the land*. The power which can create the *supreme law of the land* in *any case* is doubtless *sovereign* as to such case.

This general and indisputable principle puts at once an end to the *abstract* question whether the United States have power to erect a *corporation*; that is to say, to give a *legal* or *artificial capacity* to one or more persons, distinct from the *natural*. For it is unquestionably incident to *sovereign power* to erect corporations, and consequently to *that* of the United States, in *relation* to the *objects* intrusted to the management of the government. The difference is this: where the authority of the government is general, it can create corporations in *all cases*; where it is confined to certain branches of legislation, it can create corporations *only* in those cases. . . .

Implied Powers

It is not denied that there are *implied* as well as *express powers* and that the *former* are as effectually delegated as the *latter*. And for the sake of accuracy it shall be mentioned that there is another class of powers which may be properly denominated *resulting powers*. It will not be doubted that, if the United States should make a conquest of any of the territories of its neighbors, they would possess sovereign jurisdiction over the conquered territory. This would be rather a result, from the whole mass of the powers of the government, and from the nature of political society, than a consequence of either of the powers specially enumerated. . . .

It is conceded that *implied powers* are to be considered as delegated equally with *express ones*. Then it follows that, as a power of erecting a corporation may as well be *implied* as any other thing, it may as well be employed as an *instrument* or *mean* of carrying into execution any of the specified powers, as any other *instrument* or *mean* whatever. The only question must be, in this, as in every other case, whether the mean to be employed or, in this instance, the corporation to be erected, has a natural relation to any of the acknowledged objects or lawful ends of the government. Thus a corporation may not be erected by Congress for superintending the police of the city of Philadelphia, because they are not authorized to *regulate* the *police* of that city. But one may be erect-

ed in relation to the collection of taxes, or to the trade with foreign countries, or to the trade between the states, or with the Indian tribes; because it is the province of the federal government to *regulate* those objects, and because it is incident to a general *sovereign* or *legislative* power to *regulate* a thing, to employ all the means which relate to its regulation to the best and greatest advantage. . . .

"The incorporation of a bank is a constitutional measure; . . . the objections taken to the bill, in this respect, are ill founded."

Through this mode of reasoning respecting the right of employing all the means requisite to the execution of the specified powers of the government, it is objected that none but necessary and proper means are to be employed; and the Secretary of State maintains that no means are to be considered as *necessary* but those without which the grant of the power would be *nugatory.* Nay, so far does he go in his restrictive interpretation of the *word*, as even to make the case of the *necessity* which shall warrant the constitutional exercise of the power to depend on *casual* and *temporary* circumstances; an idea which alone refutes the construction. The *expediency* of exercising a particular power, at a particular time, must, indeed, depend on circumstances; but the constitutional right of exercising it must be uniform and invariable, the same today as tomorrow.

All the arguments, therefore, against the constitutionality of the bill derived from the accidental existence of certain state banks—institutions which happen to exist today and, for aught that concerns the government of the United States, may disappear tomorrow—must not only be rejected as fallacious but must be viewed as demonstrative that there is a *radical* source of error in the reasoning.

The Meaning of *Necessary*

It is essential to the being of the national government that so erroneous a conception of the meaning of the word *necessary* should be exploded.

It is certain that neither the grammatical nor popular sense of the term requires that construction. According to both, *necessary* often means no more than *needful*, *requisite*, *incidental*, *useful*, or *conducive to.* It is a common mode of expression to say that it is *necessary* for a government or a person to do this or that thing, when nothing more is intended or understood than that the interests of the government or person require, or will be promoted by, the doing of this or that thing. The imagination can be at no loss for exemplifications of the use of the word in this sense. And it is the true one in which it is to be understood as used in the Constitution. The whole turn of the clause containing it indicates that it was the intent of the Convention, by that clause, to give a liberal latitude to the exercise of the specified powers. The expressions have peculiar comprehensiveness. They are, "to make all *laws* necessary and proper for *carrying into execution the foregoing powers*, and *all other powers* vested by the Constitution in the *government* of the United States, or in any *department* or *officer* thereof."

To understand the word as the Secretary of State does would be to depart from its obvious and popular sense and to give it a restrictive operation, an idea never before entertained. It would be to give it the same force as if the word *absolutely* or *indispensably* had been prefixed to it.

Such a construction would beget endless uncertainty and embarrassment. The cases must be palpable and extreme, in which it could be pronounced, with certainty, that a measure was absolutely necessary, or one, without which, the exercise of a given power would be nugatory. There are few measures of any government which would stand so severe a test. To insist upon it would be to make the criterion of the exercise of any implied power a *case of extreme necessity*; which is rather a rule to justify the overleaping of the bounds of constitutional authority than to govern the ordinary exercise of it. . . .

The *degree* in which a measure is necessary can never be a *test* of the legal right to adopt it; that must be a matter of opinion and can only be a *test* of expediency. The *relation* between the *measure* and the *end*; between the *nature* of the *mean* employed toward the execution of a power and the object of that power, must be the criterion of constitutionality, not the more or less of *necessity* or *utility*. . . .

This restrictive interpretation of the word *necessary* is also contrary to this sound maxim of construction; namely that the powers contained in a constitution of government, especially those which concern the general administration of the affairs of a country, its finances, trade, defense, etc., ought to be construed liberally in advancement of the public good. This rule does not depend on the particular form of a government, or on the particular demarcation of the boundaries of its powers, but on the nature and objects of government itself. The means by which national exigencies are to be provided for, national inconveniences obviated, national prosperity promoted, are of such infinite variety, extent, and complexity, that there must of necessity be great latitude of discretion in the selection and application of

those means. Hence, consequently, the necessity and propriety of exercising the authorities intrusted to a government on principles of liberal construction. . . .

But the doctrine which is contended for is not chargeable with the consequences imputed to it. It does not affirm that the national government is sovereign in all respects but that it is sovereign to a certain extent; that is, to the extent of the objects of its specified powers.

It leaves, therefore, a criterion of what is constitutional and of what is not so. This criterion is the *end*, to which the measure relates as a *mean*. If the *end* be clearly comprehended within any of the specified powers, and if the measures have an obvious relation to that *end*, and is not forbidden by a particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority. There is also this further criterion, which may materially assist the decision: Does the proposed measure abridge a pre-existing right of any state or of any individual? If it does not, there is a strong presumption in favor of its constitutionality, and slighter relations to any declared object of the Constitution may be permitted to turn the scale. . . .

The Case for a National Bank

It shall now be endeavored to be shown that there is a power to erect one [bank] of the kind proposed by the bill. This will be done by tracing a natural and obvious relation between the institution of a bank and the objects of several of the enumerated powers of the government; and by showing that, *politically* speaking, it is necessary to the effectual execution of one or more of those powers. . . .

To establish such a right, it remains to show the relation of such an institution to one or more of the specified powers of the government. Accordingly it is affirmed that it has a relation, more or less direct, to the power of collecting taxes, to that of borrowing money, to that of regulating trade between the states, and to those of raising and maintaining fleets and armies. To the two former the relation may be said to be immediate; and in the last place it will be argued that it is clearly within the provision which authorizes the making of all *needful rules and regulations* concerning the *property* of the United States, as the same has been practiced upon by the government.

A bank relates to the collection of taxes in two ways—*indirectly*, by increasing the quantity of circulating medium and quickening circulation, which facilitates the means of paying directly, by creating a *convenient species* of medium in which they are to be paid. . . .

A bank has a direct relation to the power of borrowing money, because it is a usual, and in sudden emergencies an essential, instrument in the obtaining of loans to government.

A nation is threatened with war; large sums are wanted on a sudden to make the necessary preparation. Taxes are laid for the purpose, but it requires time to obtain the benefit of them. Anticipation is indispensable. If there be a bank, the supply can at once be had. If there be none, loans from individuals must be sought. The progress of these is often too slow for the exigency; in some situations they are not practicable at all. Frequently, when they are, it is of great consequence to be able to anticipate the product of them by advance from a bank. . . .

Let it then be supposed that the necessity existed (as but for a casualty would be the case), that proposals were made for obtaining a loan; that a number of individuals came forward and said, "We are willing to accommodate the government with the money"; with what we have in hand, and the credit we can raise upon it, we doubt not of being able to furnish the sum required, but in order to do this it is indispensable that we should be incorporated as a bank. This is essential toward putting it in our power to do what is desired, and we are obliged on that account to make it the *consideration* or *condition* of the loan.

Can it be believed that a compliance with this proposition would be unconstitutional? . . .

The institution of a bank has also a natural relation to the regulation of trade between the states, in so far as it is conducive to the creation of a convenient medium of *exchange* between them, and to the keeping up a full circulation, by preventing the frequent displacement of the metals in reciprocal remittances. Money is the very hinge on which commerce turns. And this does not merely mean gold and silver; many other things have served the purpose, with different degrees of utility. Paper has been extensively employed. . . .

Regulating Commerce

The Secretary of State further argues that if this was a regulation of commerce, it would be void, as *extending as much to the internal commerce of every state as to its external.* But what regulation of commerce does not extend to the internal commerce of every state? What are all the duties upon imported articles, amounting to prohibitions, but so many bounties upon domestic manufactures, affecting the interests of different classes of citizens, in different ways? What are all the provisions in the Coasting Act which relate to the trade between district and district of the same state? In short, what regulation of trade between the states but must affect the internal trade of each state? What can operate upon the whole but must extend to every part?

The relation of a bank to the execution of the powers that concern the common defense has been anticipated. It has been noted that, at this very

moment, the aid of such an institution is essential to the measures to be pursued for the protection of our frontiers.

It now remains to show that the incorporation of a bank is within the operation of the provision which authorizes Congress to make all needful rules and regulations concerning the property of the United States. But it is previously necessary to advert to a distinction which has been taken by the Attorney-General.

He admits that the word *property* may signify personal property, however acquired, and yet asserts that it cannot signify money arising from the sources of revenue pointed out in the Constitution, "because," says he, "the disposal and regulation of money is the final cause for raising it by taxes."

But it would be more accurate to say that the *object* to which money is intended to be applied is the *final cause* for raising it than that the disposal and regulation of it is *such*.

The support of government—the support of troops for the common defense—the payment of the public debt, are the true *final causes* for raising money. The disposition and regulation if it, when raised, are the steps by which it is applied to the *ends* for which it was raised, not the *ends* themselves. Hence, therefore, the money to be raised by taxes, as well as any other personal property, must be supposed to come within the meaning, as they certainly do within the letter, of authority to make all needful rules and regulations concerning the property of the United States. . . .

Objections to a National Bank Are Baseless

A hope is entertained that it has, by this time, been made to appear, to the satisfaction of the President, that a bank has a natural relation to the power of collecting taxes—to that of regulating trade—to that of providing for the common defense—and that, as the bill under consideration contemplates the government in the light of a joint proprietor of the stock of the bank, it brings the case within the provision of the clause of the Constitution which immediately respects the property of the United States.

Under a conviction that such a relation subsists, the Secretary of the Treasury, with all deference, conceives, that it will result as a necessary consequence from the position, that all the specified powers of government are sovereign, as to the proper objects; that the incorporation of a bank is a constitutional measure; and that the objections taken to the bill, in this respect, are ill founded.

For Further Reading

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